COMPELLING THE ACCUSED TO DISCLOSE HIS DEFENSES DURING PRE-TRIAL: A BOLD IMPROVEMENT*

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On June 8, 2004, the Supreme Court issued the "Guidelines to be Observed by Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery Measures" ("Pre-Trial Circular").[1] These were to take effect on July 1, following publication in a newspaper of general circulation not later than June 30. The first part of the guidelines applies to civil cases, while the second applies to criminal cases. This latter part reads:

> B. Criminal Cases
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> 1. Before arraignment, the Court shall issue an order directing the public prosecutor to submit the record of the preliminary investigation to the Branch COC for the latter to attach the same to the record of the criminal case.
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> Where the accused is under preventive detention, his case shall be raffled and its records transmitted to the judge to whom

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* *Cite as* Ricardo Galvez, *Compelling the Accused to Disclose His Defenses During Pre-Trial: A Bold Improvement*, 79 PHIL. L.J. 919, (page cited) (2005).

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[1] A.M. 03-1-09-SC.

the case was raffled within three days from the filing of the complaint or information. The accused shall be arraigned within ten days from the date of the raffle. The pre-trial of his case shall be held within ten days after arraignment unless a shorter period is provided for by law.

2. After the arraignment, the court shall forthwith set the pre-trial conference within thirty days from the date of arraignment, and issue an order: (a) requiring the private offended party to appear thereat for purposes of plea-bargaining except for violations of the Comprehensive Dangerous Drugs Act of 2002, and for other matters requiring his presence; (b) referring the case to the Branch COC, if warranted, for a preliminary conference to be set up at least three days prior to the pre-trial to mark the documents or exhibits to be presented by the parties and copies thereof to be attached to the records after comparison and to consider other matters as may aid in its prompt disposition; and (c) informing the parties that no evidence shall be allowed to be presented and offered during the trial other than those identified and marked during the pre-trial except when allowed by the court for good cause shown. A copy of the order is hereto attached as Annex "E". In mediatable cases, the judge shall refer the parties and their counsel to the PMC unit for purposes of mediation if available.

3. During the preliminary conference, the Branch CCC shall assist the parties in reaching a settlement of the civil aspect of the case, mark the documents to be presented as exhibits and copies thereof attached to the records after comparison, ascertain from the parties the undisputed facts and admissions on the genuineness and due execution of documents marked as exhibits and consider such other matters as may aid in the prompt disposition of the case. The proceedings during the preliminary conference shall be recorded in the Minutes of Preliminary Conference to be signed by both parties and counsel. (Please see Annex "B") The Minutes of Preliminary Conference and the exhibits shall be attached by the Branch COC to the case record before the pre-trial.

4. Before the pre-trial conference the judge must study the allegations of the information, the statements in the affidavits and other documentary evidence which form part of the record of the preliminary investigation.

5. During the pre-trial, except for violations of the Comprehensive Dangerous Drugs Act of 2002, the trial judge shall consider plea-bargaining arrangements. Where the prosecution and the offended party agree to the plea offered by the accused, the court shall:

a. Issue an order which contains the plead bargaining arrived at;

b. Proceed to receive evidence on the civil aspect of the case; and

c. Render and promulgate judgment of conviction, including the civil liability or damages duly established by the evidence.

6. When plea bargaining fails, the Court shall:

a. Adopt the minutes of preliminary conference as part of the pre-trial proceedings, confirm markings of exhibits or substituted photocopies and admissions on the genuineness and due execution of documents and list object and testimonial evidence;

b. Scrutinize every allegation of the information and the statements in the affidavits and other documents identified and marked as exhibits in determining further admissions of facts, documents and in particular as to the following:

1. the identity of the accused;

2. court's territorial jurisdiction relative to the offense/s charged;

3. qualification of expert witness/es;

4. amount of damages;

5. genuineness and due execution of documents;

6. the cause of death or injury, in proper cases;

7. adoption of any evidence presented during the preliminary investigation;

8. disclosure of defenses of alibi, insanity, self-defense, exercise of public authority and justifying or exempting circumstances; and

9. such other matters that would limit the facts in issue.

c. Define factual and legal issues;

d. Ask parties to agree on the specific trial dates and adhere to the flow chart determined by the court which shall contain time frames for the different stages of the proceeding up to the promulgation of decision and use time frame for each stage in setting the trial dates;

e. Require the parties to submit to the Branch COC the names, addresses and contact numbers of witnesses that need to be summoned by *subpoena*; and

f. Consider modification of order of trial if the accused admits the charge but interposes a lawful defense.

7. During the pre-trial, the judge shall be the one to ask questions on issues raised therein and all questions must be directed to him to avoid hostilities between parties;

8. All agreements or admissions made or entered during the pre-trial conference shall be reduced in writing and signed by the accused and counsel, otherwise, they cannot be used against the accused. The agreements covering matters referred to in Section 1 of Rule 118 shall be approved by the court. (Section 2, Rule 118)

9. All proceedings during the pre-trial shall be recorded, the transcripts prepared and the minutes signed by the parties and/or their counsels.

10. The trial judge shall issue a Pre-trial Order within ten (10) days after the termination of the pre-trial setting forth the actions taken during the pre-trial conference, the facts stipulated, the admissions made, evidence marked, the number of witnesses to be presented and the schedule of trial. Said Order shall bind the parties, limit the trial to matters not disposed of and control the course of the action during the trial.

Recently, the Free Legal Assistance Group ("FLAG"), through its President, Atty. Arno Sanidad, and the Integrated Bar of the Philippines ("IBP") Cebu Chapter jointly petitioned the Court to suspend the implementation of the Pre-Trial Circular with respect to criminal cases. They claimed that its provisions affect largely their clients, perhaps referring to the requirement that they identify and mark affidavits and other evidence during pre-trial, and that no other evidence except these shall be allowed to be presented and offered during trial, *except when allowed by the court for good cause shown.*

The Circular likewise directs the trial judge, when plea bargaining fails, to scrutinize every allegation in the affidavits and other documents submitted during the preliminary investigation, and other documents identified and marked as exhibits during the pre-trial to aid in determining admissions of facts and other matters, particularly the *"disclosure of defenses of alibi, insanity, self-defense, exercise of public authority, and justifying or exempting circumstances; and such other matters that would limit the facts in issue."*

Several groups have argued, and this probably includes those who petitioned for the suspension of the circular's implementation with respect to criminal cases, that compelling an accused to disclose his defenses during the pre-trial conference would violate his right to remain silent, his right against self-incrimination, and the presumption of innocence.

I. THE RIGHT TO REMAIN SILENT

The 1987 Constitution provides:

> Sec. 12. (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.
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> (2) No torture, force, violence, threat, intimidation or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, *incommunicado*, or other similar forms or detention are prohibited.
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> (3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.
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> (4) The law shall provide for penal and civil sanctions for violations of this Section as well as compensation to an rehabilitation of victims of torture or similar practices, and their families.[2]

Under the 1973 Constitution, the rights to remain silent and to counsel, and to be informed of such rights, seemed to have been limited to "custodial investigations" in the sense of *Escobedo v. Illinois*.[3] Following this case, these rights would only be available when "the investigation is no longer a general inquiry into an unsolved crime but has began to focus on a particular suspect, the suspect has been taken into police custody, the police

[2] Art. III, § 12.
[3] 378 U.S. 478 (1964).

carry out a process of interrogations that lends itself to eliciting incriminating statements."[4]

While the 1987 Constitution has preserved the phrase "person under investigation," its coverage, according to Fr. Joaquin Bernas, SJ, has been expanded in the light of martial law experiences. He explains:

> Commissioner Colayco explained that, indeed, the intention was to extend the guarantee beyond mere strict custodial investigation of the *Escobedo* variety to "the time immediately after the commission of any offense, whether the policeman or the person making the investigation [had] any suspect under custody." Or, as Commissioner Aquino summed it up, the right should extend to the period of "custodial interrogation, temporary detention and preliminary technical custody."[5]

However, the right of the accused to remain silent cannot possibly be interpreted as allowing the defense to stonewall and keep even the trial judge in the dark as to what his defenses will be, thereby preventing the latter from readily grasping the factual issues which the he is called to resolve. The right to remain silent should be restricted to where it was intended to apply in the first place: investigations conducted by the police authorities concerning the commission of a crime whether or not the accused is under custody, and even to preliminary investigations, but not to judicial trials.

Fr. Bernas further comments:

> Delegate R. Ortiz, who was sponsoring the provision, said that "investigation" here did not include *judicial* and *quasi-judicial* investigations such as those conducted by the fiscal or by the judge. Justice Narvasa was referring to the same matter when he said that Section 12(1) does not apply to persons under preliminary investigation or already charged in court for a crime and therefore already under the protection of the court....
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> Conceivably, however, even after charges are filed, the police might still attempt to extract confessions or admissions from the accused outside of judicial supervision. In such situation, Section 12(1) would still apply. But outside of such situation, the applicable provisions are Section 14 and Section 17. It is for this reason that an

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[4] *Id.* at 490-91.

[5] JOAQUIN BERNAS, SJ, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 455-56 (2003 ed.).

> extrajudicial confession sworn to before a judge enjoys the mark of voluntariness. (internal citations omitted)[6]

THE RIGHT AGAINST SELF-INCRIMINATION

The Constitution further provides:

> Sec. 17. No person shall be compelled to be a witness against himself.[7]

In *Williams v. Florida*,[8] Williams, who stood accused of robbery, questioned a provision in the Florida Rules of Criminal Procedure that required an accused, on the prosecutor's written demand, to give notice before trial whether he intends to put up the defense of alibi, and if so, to furnish the prosecutor with information as to the place where he claims to have been and the names and addresses of the alibi witnesses he intends to use. Williams claimed this "compels the defendant to be a witness against himself."[9]

The United States Supreme Court held that the right against self-incrimination cannot be invoked to withhold from the prosecution that a defendant intends to raise the defense of alibi:

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. ...
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> ...Also, requiring him to reveal the elements of his defense is claimed to have interfered with his right to wait until after the State had presented its case to decide how to defend against it. We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses.

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[6] *Id.* at 460.
[7] Art. III, § 17.
[8] 399 U.S. 78 (1970).
[9] *Id.* at 79.

> The defendant in a criminal case is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catasrophe for the defendant. However, "testimonial" or "incriminating" the alibi defense proves to be, it cannot be considered "compelled" within the meaning of the Fifth and Fourteenth Amendments.[10]

Wardius v. Oregon[11] struck down as unconstitutional another disclosure rule, but the Oregon provision was different because it was not reciprocal, and failed to place an equal duty on the prosecution to disclose in advance its rebuttal evidence. It reasoned that "if there is to be any imbalance in discovery rights, it should work in the defendant's favor."[12] *Wardius* implies that the compelled prior disclosure of the plan to use an alibi defense and the accompanying evidence is not itself unconstitutional, provided that the prosecution is also required beforehand to disclose its evidence. The new Philippine Pre-Trial Circular provides for such reciprocity, since both the prosecution and the accused are required to submit affidavits of their respective witnesses beforehand.

Robert Mosteller observed that in the United States, in addition to prosecutorial discovery with respect to alibi and insanity, which is available in the great majority of the states, twenty-five states grant the prosecution an independent or non-reciprocal right to discover at least one of the following: "defense witnesses' names, statements of witnesses, reports of experts or document and tangible evidence."[13] Seven provide for broad defense disclosure upon a request for discovery from the prosecution. Twelve give the prosecution an independent right to obtain statements of all defense witnesses, and three more permit this discovery when the accused seeks

[10] *Id.* at 81-84.

[11] 412 U.S. 470 (1973).

[12] *Id.* at 475 n.9.

[13] *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1576 (1986).

discovery from the government. Some states require an accused to summarize the expected testimony of defense witnesses and to create a statement summarizing oral statements of witnesses. Other states require the accused to furnish the government with statements they took from government witnesses.[14]

THE PRESUMPTION OF INNOCENCE

A noted commentary reads:

> In some instances, however, these substantive rules are incorrectly referred to as presumptions. The most glaring example of this mislabeling is the "presumption of innocence" as the phrase is used in criminal cases. The phrase is probably better called the "assumption of innocence" in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful. ... Although the phrase is technically inaccurate and perhaps even misleading in the sense that it suggests that there is some inherent probability that the defendant is innocent, it is a basic component of a fair trial. Like the requirement of proof beyond a reasonable doubt, it at least indicates to the jury that if a mistake is to be made it should be made in favor of the accused, or as Wigmore stated, "the term does convey a special and perhaps useful hint ... in that it cautions the jury to put away from the minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced."[15]

The presumption of innocence[16] simply means that an accused is presumed innocent until the contrary is proved. Accordingly, during the trial, the State must prove the guilt of the accused beyond reasonable doubt, and its failure to do so entitles the accused to an acquittal. However, this presumption is wholly independent of the submission, marking, and identification of the affidavits of both prosecution and defense during the pre-trial conference, as well as the disclosure of their respective witnesses. This procedure merely enables a trial judge to intelligently sort out, prior to the trial, the factual and legal issues involved in the case.

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[14] STEPHEN SALTZBURG & DANIEL CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 808 (5th ed. 1996).

[15] JOHN STRONG ET AL., MCCORMICK ON EVIDENCE 520 (5th ed. 1999), *citing* JOHN WIGMORE, EVIDENCE, § 2511, at 407 (Chadbourn rev. ed. 1981).

[16] CONST. art. III, § 14(2).

The pre-trial conference is not the trial proper, and affidavits so marked during pre-trial cannot be considered as formally offered in lieu of the affiants' direct testimonies. This may only be done during the trial and only after the affiants are cross-examined, unless this is waived. The pre-trial conference is merely a forum where both prosecution and defense voluntarily reveal the legal strength of their respective cases before the trial judge. The underlying assumption is that the sooner each side knows each other's relative weaknesses and strengths, the sooner they can proceed to negotiate a plea bargain in good faith. This mutual disclosure resolves any uncertainty regarding the need to go to trial, and avoids the filing of time-consuming motions and continuances. Nothing disclosed at the pre-trial conference is likely to affect the outcome of cases that subsequently go to trial. Pre-trial's main objective of pre-trial is the simplification, abbreviation, and expedition of the trial.[17]

In his concurring opinion in *People v. Webb*,[18] Justice Reynato Puno conceded as historical fact that our Rules of Court were taken from the United States'. He traced the history and evolution of the American discovery and deposition rules, and how they were eventually adopted in criminal cases:

> The liberalization of the rules of discovery in criminal procedure in the United States while slow was unabated. In the 1960's, the movement received tremendous impetus from a liberal US Supreme Court led by Chief Justice Earl Warren whose decisions radically expanded the rights of an accused. For years and until now, proponents and opponents of liberal defense discovery and depositions in criminal cases continue to lock horns. Proponents of liberal defense discovery hammer on the need to make criminal trials "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (internal citations omitted)[19]

Justice Puno continued:

> [T]he move towards a more liberal discovery and deposition procedure in criminal cases is even slower but its march, likewise, appears inexorable. There can be no stepping back for the 1987 Constitution has gone to the extent of constitutionalizing basic rights of an accused, which has not been done in the United States. With this new orientation of the Constitution, this Court itself has taken

[17] Tiu v. Middleton, G.R. No. 134998, 310 SCRA 580, 588, Jul. 19, 1999.
[18] G.R. No. 132577, 312 SCRA 573, Aug. 17, 1999.
[19] *Id.* at 598 (Puno, J., *concurring*).

> steps to liberalize our rules of criminal procedure. Thus, Section 1, Rule 118 of our 1985 Rules on Criminal Procedure for the first time ordered the holding of pre-trial when the accused and the counsel agree. The fruitful experience of courts holding pre-trial in criminal cases has impelled requests that our rules be further amended to make it mandatory.

Decades ago, Judge Learned Hand, lamenting the implications of the one-sided access of the accused to prosecutorial information, stated in *United States v. Garsson*:[20]

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge. he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[21]

It is about time that we properly treat a criminal trial as a search for truth and not merely look upon it as "a poker game in which players enjoy an absolute right always to conceal their cards until played." This can only attained if we allow the disclosure of facts to the fullest practicable extent during the pre-trial conference. After all, as stressed in *Permanent Concrete Products, Inc. v. Teodoro*,[22] pre-trial aims to remove the case from the realm of surprise and maneuvering. This principle readily applies to criminal prosecution. Again, to obviate the element of surprise, parties must now be expected to disclose at the pre-trial conference *all issues of law and fact which they intend to raise at the trial*, except those which may be privileged or impeaching matter.

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[20] 291 F. 646 (S.D.N.Y. 1923).

[21] *Id.* at 679.

[22] G.R. No. 29766, 26 SCRA 332, Nov. 29, 1968.